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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-822

THE SOUTHLAND CORPORATION,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

M. ERLE PHILLIPS
FISHER & PHILLIPS
3500 First National Bank Tower
Atlanta, Georgia 30303
ATTORNEY FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO.

THE SOUTHLAND CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Southland Corporation, Petitioner herein, by and through its undersigned counsel, petitions this Court for a Writ of Certiorari to review the Decision of the United States Court of Appeals for the Fifth Circuit, entered in this case on September 13,1974, granting enforcement of an Order issued against Petitioner by the National Labor Relations Board.

OPINIONS BELOW

The Opinion of the Court of

Appeals (App.A., infra, pp.1A-2A)[1] is unreported. The Decision and Order of the National Labor Relations Board (App. B, infra, pp.5A-55A) are reported at 208 NLRB No. 108, 85 LRRM 1566 (1974).

JURISDICTION

The Decision of the Court of Appeals was rendered on September 13,1974 (App.A, infra, pp.1A-2A); the Judgment of the Court of Appeals (App.A, infra, pp.3A-4A) was entered on October 7, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §10(e) of the National Labor Relations Act, as amended (hereinafter referred to as the "Act"), 29 U.S.C. §160(e).

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board's finding that Petitioner violated §8(a)(1) of the Act by conduct neither alleged in its complaint nor litigated at the hearing constitutes a denial of due process of law.

2. Whether it is a denial of due process of law to find that Petitioner violated §8(a)(3) of the Act in discharging three of its employees, when the inference of anti-union animus, necessary to finding the discharges unlawful, is

[1] All "App." references are to the Appendices attached hereto in accordance with Rule 23(i) of this Court.

drawn from an independent §8(a)(1) violation neither alleged in the Board's complaint nor litigated at the hearing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in part:

> No person shall be... deprived of life, liberty, or property, without due process of law....

The National Labor Relations Act, as amended, 29 U.S.C. §§151, et. seq., insofar as here pertinent, provides:

> Section 8(a): It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> * * *
> (3)by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization....
>
> Section 10(e):...The findings of the Board with respect

> to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive ....Upon the filing of the record with it the jurisdiction of the Court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review...by the Supreme Court of the United States upon Writ of Certiorari...as provided in Section 1254 of Title 28.

STATEMENT OF THE CASE

The Board's Complaint in this case, as amended, alleged that the Company violated Section 8(a)(1) of the Act by making certain threats to its employees in a speech delivered by its Plant Superintendent on April 13, 1973. The Complaint also alleged that the Company violated Sections 8(a)(1) and 8(a)(3) of the Act in the termination of three of its employees. No other unfair labor practices were alleged.

After a hearing in Tyler, Texas, on July 10-11, 1973, Administrative Law Judge Max Rosenburg issued his Decision on September 21, 1973 (App.B, infra, pp. 12A-55A). He dismissed the allegation that the April 13 speech contained unlawful threats (App.B, infra, pp. 48A-49A), but

nonetheless found a violation of Section 8(a)(1) based upon certain conduct not alleged in the Complaint.2/ He further found all three of the discharges to have been discriminatorily motivated.

Subsequently, both the Company and the General Counsel filed exceptions to the Administrative Law Judge's Decision. On January 25, 1974, the Board issued its Decision and Order rejecting the Company's exceptions, and affirming the Administrative Law Judge's rulings, findings and conclusions, as modified (App.B, infra,

2/ In his decision, the Administrative Law Judge stated that "The Complaint also alleges that Hightshoe violated Section 8(a)(1) by warning employees that they .. would suffer discharge at Respondent's hands in the event they embraced the Union in its organizational efforts." (App. B, infra, p.49A). This is an intentionally misleading statement. The Complaint did allege that Hightshoe "orally warned its employees they would be discharged if they became or remained members of the Union or gave any assistance or support to it", but it specifically and unequivocally referred to the April 13 speech, which was found to contain no such warnings. No other instances of warnings to employees was alleged in the Complaint, nor was any even urged by counsel for the Board's General Counsel in his post-hearing brief. The Administrative Law Judge, sua sponte, found an independent section 8(a)(1) violation.

pp. 5A-11A).

The Board ordered the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining or coercing employees in the exercise of their Section 7 rights. Affirmatively, the Board ordered Petitioner to offer the alleged discriminatees full and immediate reinstatement and to make them whole for any loss of earnings they may have suffered as a result of its conduct. It also ordered Petitioner to rescind the warning notice from its personnel files and to post appropriate notices (App.B, infra, pp. 9A-11A).

Petitioner, in its exceptions and brief to the Board, raised the issue of denial of due process of law in the Administrative Law Judge's finding of a Section 8(a)(1) violation neither pleaded nor litigated. The Board, however, did not acknowledge or discuss the issue in its Decision and Order (App.B, infra, pp. 5A-11A).

Petitioner similarly raised the issue in its brief to the Court of Appeals, but again it was ignored in the Court's one-word, per curiam, opinion (App.A, infra, pp. 1A-2A).

REASONS FOR GRANTING THE WRIT

I. IT IS A DENIAL OF DUE PROCESS OF LAW TO FIND A VIOLATION OF THE ACT BY ALLEGED CONDUCT NEITHER CHARGED IN THE COMPLAINT NOR FULLY LITIGATED

The most fundamental requirements of due process of law are those of notice and hearing. In administrative proceedings of a quasijudicial character, such as is in issue here, there must be a fair and open hearing. Such a hearing includes not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party, and to meet those claims. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773 (1938).

The Complaint in this case alluded to certain threats which were allegedly made by Petitioner in violation of Section 8(a)(1) of the Act. More particularly, the unlawful remarks were alleged to have occurred in a speech to assembled employees by Plant Superintendent M. T. Hightshoe on April 13, 1973. That these were the only remarks alleged to have violated the Act is clear from the face of the Complaint itself.

During the course of the hearing, Counsel for General Counsel elicited certain testimony from one of its witnesses which, if accurate, may have tended to

to support a finding of unlawful threats in the speech. However, on cross-examination, the witness was confronted with a typewritten document, which he conceded to be the speech as actually delivered by Hightshoe (App.B, infra, pp. 17A-19A). Since the speech was thus not coercive as alleged in the Complaint, the allegation that the speech was unlawful was, properly, dismissed by the Administrative Law Judge (App.B, infra, p. 49A).

As this was the only "warning" alleged in the Complaint to have been uttered by Petitioner, this dismissal should have ended any inquiry in the area of independent Section 8(a)(1) violations. However, the Administrative Law Judge proceeded to find a violation of Section 8 (a)(1) based upon a finding that remarks neither alleged nor even remotely suggested in the Complaint were made, and the Board affirmed this finding without comment.

The remarks found to have violated Section 8(a)(1) allegedly occurred in a conversation between Hart, one of the discharged employees, and Hightshoe in Hightshoe's office on April 15 or 16, 1973 (App.B, infra, pp. 30A, 49A).

That Hart's testimony was not contradicted, as noted by the Administrative Law Judge, is not surprising. Petitioner had no notice that such an allegation would be made, and hence had no opportunity to investigate the alleged incident

or to gather any rebutting evidence that may have existed. To thus find that Petitioner violated the Act by alleged conduct of which it had no notice and which was not litigated at the hearing violates elementary due process requirements.

The Board itself has clearly recognized that a finding of a violation of the Act cannot be based upon facts neither alleged in the Complaint nor fully litigated at the hearing. Glasgow Industries, Inc., 210 NLRB No. 22 (1974); Howell Refining Co., 163 NLRB 18, 23 (1967); Bruns Garage, Inc., 148 NLRB 363 (1964). In Howell Refining Co., the facts were remarkably similar to those in the instant case. The Trial Examiner found a violation of Section 8(a)(1) based upon uncontradicted testimony regarding an incident not alleged in the complaint. There, as here, there was no cross-examination or rebuttal as to the alleged incident, and no amendment of the complaint to include the alleged incident. Therefore, the Board concluded, it would be improper to uphold a finding of a violation based upon conduct neither alleged not litigated.

In this case, the Administrative Law Judge obviously recognized that an allegation in the Complaint, thus giving notice to Respondent, was necessary before he could find that the alleged con-

versation violated Section 8(a)(1). He alluded to the Complaint allegation that Hightshoe violated 8(a)(1) by warning employees that they would suffer discharge should they embrace the Union (App.B, infra, 49A), but he blithely ignored the fact that this allegation specifically and unequivocally referred only to the April 13 speech.

There is absolutely nothing in the Complaint even remotely providing notice to Petitioner of the alleged unlawful remark to Hart by Hightshoe, nor can it seriously be contended that Hart's testimony, without cross-examination or offer of rebutting evidence, constituted "litigation" of the issue. Indeed, having been caught by surprise by Hart's allegation, it would have been foolhardy of counsel for Petitioner to pursue the matter without first investigating and preparing a defense, and for that there was no opportunity. "It is an essential element of due process that an interested party must be given notice and an opportunity to prepare a defense prior to an adjudicative proceeding." S. S. Kresge Co. v. NLRB, 416 F.2d 1225 (6th Cir. 1969).

The courts have long recognized that "Evidence without a supporting allegation cannot serve as the basis of a determination of an unfair labor practice." Russell-Newman Manufacturing Co. v. NLRB, 370 F.2d 980 (5th Cir. 1967);

NLRB v. Threads, Inc., 308 F.2d 1, 9 (4th Cir. 1962). Noting that the mere mentioning of certain conduct, as was done in the instant case, does not constitute litigation of the issue, the Court of Appeals stated in Engineers & Fabricators, Inc. v. NLRB, 376 F.2d 482,485 (5th Cir. 1967), that "It offends elemental concepts of procedural due process to grant enforcement to a finding neither charged in the complaint nor litigated at the hearing."

The right of due process of law is a substantial right, and should not be lightly regarded. In this case, Petitioner was clearly denied due process by a finding that it violated the Act by conduct of which it neither had notice nor an opportunity to litigate. Equally clearly, the Court of Appeals erred in failing to set aside this finding, in contravention of its own precedent as well as the cited decisions of other Courts of Appeals.

II. WHERE ANTI-UNION ANIMUS HAS BEEN IMPROPERLY FOUND, PETITIONER CANNOT BE HELD TO HAVE VIOLATED THE ACT.

In order to find discharges of employees to have violated the Act, three essential elements must exist: (1) knowledge of the employees' union activity; (2) anti-union animus; and (3) discharge resulting from anti-union animus. In other words, in order to find a violation

of Section 8(a)(3) of the Act, "the Board must find that the employer acted for a proscribed purpose". American Ship Building Co. v. NLRB, 380 U.S. 300, 313 (1965). Moreover, "the Board must find from evidence independent of the mere conduct involved that the conduct was primarily motivated by an anti-union animus". NLRB v. Brown, 380 U.S. 278,288 (1965).

Thus, an intermediate finding of anti-union animus is necessary to a finding that any of the discharges at issue herein are unlawful.

In his Decision, the Administrative Law Judge outlined certain conduct of Petitioner which he stated provided a "backdrop of Respondent's hostility toward the unionization of its (plant)" (App. B, infra, p. 30A). It is this finding that is central to the whole case, since an intermediate finding of anti-union animus is necessary to find that discharges are unlawful.

Even if the Board had not based its conclusions on anti-union animus, the absence of such animus would disprove discriminatory intent in the discharge. As the Court stated in NLRB v. Brown, supra:

> Under (Section 8(a)(3)) both discrimination and a resulting discouragement

> of union membership are necessary, but the added element of unlawful intent is also required....The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of anti-union animus is necessary. (Emphasis added). 380 U.S. at 286.

There are three separate incidents indicated as providing a "backdrop of... hostility toward unionization" to support the Board's finding that the discharges were unlawful. As set forth in the Administrative Law Judge's Decision, those incidents were: The April 13 speech by Hightshoe; the alleged threat of reprisal by Hightshoe to Hart on April 15 or 16; and the remark attributed by Hart to Foreman Woodruff that Petitioner's warning notices were for getting rid of troublemakers (App. B, infra, p.30A).

As noted, supra, the April 13 speech was found to have been lawful. Apparently in response to Petitioner's urging that reliance upon an admittedly lawful speech to show anti-union animus was improper, the Board in its decision specifically disclaimed any inference of such animus from the speech (App. B,

infra, p. 6A, fn. 1).

This, then, leaves two "incidents" from which the Board apparently inferred anti-union animus.

The alleged conversation between Hart and Hightshoe in Hightshoe's office on April 15 or 16 was relied upon most heavily by the Administrative Law Judge in his finding of Petitioner's "hostility".

This conversation is credited in its entirety as testified to by Hart, purportedly because it stood uncontradicted. However, as noted, supra, Petitioner had no notice that this incident was alleged to have occurred and thus had no opportunity to prepare a defense. Further, as was shown, supra, it is a denial of due process to consider evidence of incidents not alleged in the Complaint as a basis for finding violations of the Act. Hence, the alleged conversation should not be considered as a basis for finding anti-union animus, as to do so deprives Petitioner of due process of law.

As to the remaining incident relied upon to show anti-union animus, the Administrative Law Judge stated that it was uncontroverted that Woodruff told Hart that Petitioner's warning slips "are for when we get ready to fire troublemakers around here we will issue these

and they will be evidence enough in court to keep you fired" (App. B, infra, p. 30A). This is an incorrect statement of facts on the record. Rather than leaving the claim uncontroverted, Woodruff testified at length as to the conversation he had with Hart concerning the warning slips, and his version of the conversation differs markedly from Hart's.

This is not a case of a credibility resolution by the Board which this Court would not in ordinary circumstances disturb, but is rather a situation in which the Board failed to make a credibility resolution in the face of conflicting testimony.

To find animus based upon two incidents, one of which was found to have occurred based upon conduct neither pleaded nor litigated, and the other of which was, apparently from the fact of the Administrative Law Judge's Decision, based upon a failure to resolve conflicting testimony, is, pure and simple, a denial of due process of law in its most basic terms.

In sum, the Board failed to establish by evidence independent of the discharges themselves that the discharges were primarily motivated by anti-union animus, as it must do to satisfy the requirements established by the Court in NLRB v. Brown, supra.

III. IT IS IMPERATIVE THAT ADMINISTRATIVE AGENCIES BE HELD TO THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS OF LAW.

We are living in an era in which we are more and more governed by administrative agencies, and in which our rights and obligations are increasingly determined and regulated by administrative proceedings. It is imperative that the Court not abdicate its responsibility of insuring that administrative agencies afford due process of law, as guaranteed by the Fifth Amendment, to all with whom they deal.

In this case, the denial of due process by the National Labor Relations Board was very basic and substantial: It denied Petitioner the right of notice and a fair hearing on the charges against it.

In order to show anti-union animus, one of the necessary elements of discriminatory discharge in violation of Section 8(a)(3) of the Act, the Board alleged in its complaint that Petitioner made unlawful threats in violation of Section 8(a)(1) in a speech in April, 1973. When it was conclusively shown that the speech made no such threats, and was not unlawful, that element was effectively disproved. However, the Administrative Law

Judge proceeded to find an unlawful threat, an independent violation of Section 8(a)(1), in conduct which had neither been pleaded nor litigated. And he explicitly based the finding that the unlawful threat was made on the fact that Petitioner presented no contradicting evidence, notwithstanding the fact that Petitioner had absolutely no notice that the conduct was alleged to have occurred.

In the past we have seen the Board, with approval by the court, circumvent its duty to give notice of charges against employers by holding that due process was not denied because the issue was fully and fairly litigated at the hearing. E.g., American Boiler Manufacturers Association v. NLRB, 366 F.2d 815 (8th Cir. 1966); Hughes Tool Co., 147 NLRB 1573 (1964).

Now the Board has come full circle and found that conduct of which Petitioner had no notice can be found violative of the Act because it was not litigated at the hearing. This must not be countenanced. The National Labor Relations Board, as all administrative agencies, must be ever aware that they are required to afford due process of law in all their proceedings, and must be reminded of all that due process requires.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

M. ERLE PHILLIPS
FISHER & PHILLIPS
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Bank Tower
Atlanta, Georgia 30303

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 30th day of December, 1974, caused the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to be served upon the following individuals as counsel for parties to the case below by causing three copies thereof for each such party to be deposited in the U.S. Mail, postage prepaid:

Office of the General Counsel
National Labor Relations Board
1717 Pennsylvania Avenue
Washington, D.C. 20570

Attention: Elliot Moore, Esquire
Allison W. Brown, Jr., Esquire
Roger T. Brice, Esquire

Robert Bork, Esquire
Solicitor General
Department of Justice
Washington, D.C. 20530

M. ERLE PHILLIPS
Counsel of Record for
Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1884
Summary Calendar*

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SOUTHLAND CORPORATION,

Respondent.

Application for Enforcement
of an Order of
The National Labor Relations Board
(Texas Case)

(September 13, 1974)

Before BELL, SIMPSON and MORGAN,
Circuit Judges.

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* Rule 18, 5 Cir.; see Isbell Enterprizes, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

PER CURIAM: ENFORCED.

See Local Rule 21.[1]

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1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 74-1884

U.S. Court
of Appeals
FILED
OCT 7 1974
Edward W.
Wadsworth
Clerk

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

SOUTHLAND CORPORATION,

Respondent.

JUDGMENT

Before: BELL, SIMPSON and MORGAN,
Circuit Judges

THIS CAUSE was submitted to this Court upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against Respondent, Southland Corporation, its officers, agents, successors, and assigns on January 25,

1974. The Court, having carefully considered the transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on September 13, 1974, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Southland Corporation, its officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

ENTERED: OCT. 7, 1974

APPENDIX B

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 16-CA-5133

SOUTHLAND CORPORATION

and

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On September 21, 1973, Administrative Law Judge Max Rosenberg issued the attached Decision in this proceeding. Thereafter, General Counsel filed exception and a supporting brief and Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations

Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

In adopting the Administrative Law Judge's 8(a)(3) finding as to the discharge of employee Hart, we rely on Plant Manager Hightshoe's speech only to show Respondent's knowledge of Hart's union activity.

The General Counsel excepts to the Administrative Law Judge's failure to find that a warning notice given to employee Hart was discriminatorily motivated and a violation of Section 8(a)(3). The Administrative Law Judge found that Woodruff told Hart that the purpose of the Employer's warning notice was for "when we get ready to fire troublemakers around here we will issue these and they will be evidence enough in Court." Furthermore, the assigned reason for the warning, viz. for smoking, was the same as that for the discharge, which we, in agreement with the Administrative Law Judge, find to be pretextual and discriminatorily motivated. We thus find the warning notice to be equally pretextual, and that the giving of the notice was designed to discourage Hart's union activities.[2/] Therefore, we find merit in the General Counsel's exception and shall modify the Conclusions of Law, the Remedy, and the recommended Order of the Administrative Law Judge as follows:

Remedy

Having found that Respondent issued a warning notice to Lowell P. Hart for an unlawful purpose, we shall order that

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2/ Murphy Body Works, Inc., 174 NLRB 824, 827.

the Respondent rescind that notice and expunge any reference to it from Hart's and its personnel files, in addition to taking the other required action recommended by the Administrative Law Judge to remedy the unfair labor practices found herein.

Conclusions of Law

Substitute the following paragraph for paragraph 4 contained in the Conclusions of Law in the Administrative Law Judge's Decision:

> 4. By discharging Lowell P. Hart, John M. Culpepper, and Mickey Hubbard, and issuing an unfounded warning notice to Hart, thereby discriminating in regard to their hire and tenure of employment, in order to discourage membership in the Union, the Respondent has engaged in and is engaging in conduct banned by Section 8(a)(3) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Southland Corporation, Owentown, Texas, its

officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge for assisting or joining the Union.

(b) Issuing unfounded warning notices to employees in order to discourage union membership.

(c) Discharging employees, thereby discriminating in regard to their hire or tenure of employment, in order to discourage membership in Dallas General Drivers, Warehousemen and Helpers, Local 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to Lowell P. Hart, John M. Culpepper, and Mickey Hubbard immediate and full reinstatement to their former jobs or, if these jobs no longer

exist, to substantially equivalent positions, without prejudice to their seniority or other privileges previously enjoyed; make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy"; and rescind the warning notice issued to Lowell P. Hart and expunge any reference to it from Respondent's personnel files.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its warehouse in Owentown, Texas, copies of the attached notice marked "Appendix." [3] Copies of

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3/ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

said notice, on forms provided by the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 16, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to those allegations not specifically found herein.

Dated January 25, 1974
Washington, D. C.

_____
Edward B. Miller, Chairman

_____
John H. Fanning, Member

_____
John A. Penello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

Case 16-CA-5133

SOUTHLAND CORPORATION

and

DALLAS GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 745, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION

Statement of the Case

MAX ROSENBERG, Administrative Law Judge: With all parties represented, this case was tried before me in Tyler, Texas, on July 10 and 11, 1973, on an amended complaint filed by the General Counsel of the National Labor Relations Board and an answer filed thereto by Southland Corporation, herein called the Respond-

ent.[1] The issues raised by the pleadings relate to whether Respondent violated Section 8(a)(3) of the National Labor Relations Act, as amended, by discharging employees Lowell P. Hart, John M. Culpepper, and Mickey Hubbard, and whether Respondent independently violated Section 8(a)(1) by other conduct to be detailed hereinafter. Briefs have been received from the General Counsel and the Respondent which have been duly considered.

Upon the entire record made in this proceeding, including my observation of the witnesses who testified, I hereby make the following:

Findings of Fact and Conclusions

I. The Business of the Employer

Respondent, a Delaware corporation, maintains a place of business in

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1/ The complaint, which issued on May 31, 1973, is based upon charges and amended charges filed and served on April 17, April 23, and April 26, 1973. On July 2, 1973, a third amended charge was filed and served on the various parties, ostensibly to delete the name of Johnny Potter as an alleged discriminatee in this proceeding.

Owentown, Texas, where it is engaged in the wholesale distribution of food. During the annual period material to this proceeding, Respondent sold and distributed products from that facility valued in excess of $50,000, of which products valued in excess of $50,000 were shipped from its Owentown, Texas, facility, to points located outside the State of Texas. The complaint alleges, the answer admits, and I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

It is admitted and I find that Dallas General Drivers, Warehousemen and Helpers, Local 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The complaint alleges that Respondent violated Section 8(a)(3) of the Act by discharging Lowell P. Hart on April 19, 1973,[2/] and John M. Culpepper and Mickey

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2/ Unless otherwise indicated, all dates herein fall in 1973.

Hubbard on April 20, because they joined and assisted the Union in its organizational drive at Respondent's Owentown installation. The complaint further alleges that Respondent offended the provisions of Section 8(a)(1) by threatening employees that they would be discharged if they joined or aided the Union, and by warning employees that their rendition of assistance or support to the Union would inevitably cause work stoppages with the result that they would lose their jobs. Respondent denies the commission of any labor practices proscribed by the Statute.

Sometime in 1972, Respondent embarked upon the construction of the Owentown facility, which is known as the Southland Distribution Center. To erect the structure, Respondent retained a contractor whose employees engaged in construction activities during the times material herein. Upon completion of the project, Respondent was programmed to computerize the warehousing of packaged foods and other products, and to distribute these items to customer store locations. On January 1, Respondent began staffing its work complement and, around March 15, it received its first shipment of merchandise in the warehouse area. On April 30, Respondent opened its doors for business.

Lowell P. Hart testified and I find that he was hired at the Center in the latter part of February as a general trainee and was employed in maintenance work under the supervision of Maintenance Supervisor Willard Woodruff. About a week following his employment, Hart became interested in collective representation and telephoned a Joe Dixon, an official of the Union located in Dallas, to seek information regarding the subject. On April 10, a union meeting was conducted in Hart's home which was attended by employees John Potter and alleged discriminatee John Culpepper. With Hart's consent, E. L. Jennings, Jr., the Union's assistant business representative, dispatched a letter on April 11 to Jack Seeley, Respondent's personnel manager, which recited:

> This is to advise you Southland Distribution Center employee Lowell Patrick Hart will be actively working as a Union Organizer, in an attempt to organize your plant.
>
> Mr. Hart's activities will remain strictly within his lawful individual rights to self organize.

It is undisputed and I find that Respondent received this letter on April 12.

On April 13, Woodruff instructed Hart to attend a meeting in the lunchroom. In the presence of approximately 50 assembled employees, Plant Superintendent M. W. Hightshoe read the following printed speech:

> Today, I am going to talk with you briefly concerning unions--a matter which I believe is of mutual concern.
>
> First, the position of your Company is that we do not want to do business with the Teamsters Union or any other union.
>
> We know unions will not help us to operate this business efficiently or profitably.
>
> We do not believe a union will do anything for you other than to cause you to pay union dues and possibly involve you in strikes which could result in the loss of your job.[3/]

3/ In his testimony, Hart initially asserted that Hightshoe remarked in his speech that "Unions would not cause anything but strikes and problems and would probably cause you being fired from this plant." When shown the text of Hightshoe's speech, Hart readily agreed that the former's reference to "strikes" was as reported in the written address, and I so find.

Before any of you were employed, we surveyed this area to find out what wages and benefits were being paid. It is my belief that your wage scales compare very favorably with those of other employees in the area doing comparable work. I know our benefit program is an outstanding one.

You did not have to pay a union to get these. We're going to continue to do the very best we can for you.

Yesterday I received a letter from [E. L. Jennings, Jr. - a reference to the letter concerning Hart].

Now, Mr. Hart has the right to try to get you to join the union on his own time. We will insist that during the time he is being paid to work that he does his job.

I think you folks are too intelligent to be taken in by Mr. Hart.

Texas has a right-to-work law, and no one can be forced to join any labor organization to get or keep his job here.

I urge you not to sign a union authorization card unless, after serious thought, you're certain you want a union, because should you sign one, you won't be able to get it back should you realize later you've made a mistake.

Thank you for your attention."

A few days following the speech, Hart engaged in a conversation with Hightshoe in the latter's office. It is Hart's uncontradicted testimony, upon which I find that, while he was placing coat hangers in the office, Hart asked his superior, "Mr. Hightshoe, I sure wish you could try to work something out with us." Hightshoe retorted, "I don't have to try to work anything out with you. It is too bad that a nice young man like you would have to get messed up in an organization like you are messed up with because you would have had a great future at this plant." 4/

Hart further testified that, when he first reported for work in February, a meeting was held among the employees during which plant rules were discussed. One of these rules prohibited smoking

4/ Hightshoe was not called to testify in this proceeding.

in the warehouse. Sometime after his entrance upon duty, Woodruff informed Hart that "until otherwise notified that I could smoke in the warehouse until they changed the rule." Thereafter, Hart smoked in the warehouse and, specifically, in the Baling and Shredding Room.5/ About a week prior to his discharge on April 19, Hart was instructed by Woodruff to post "no smoking" signs in the air-conditioned area and the warehouse. When Hart inquired whether he should affix a sign to the wall in the Baling and Shredding Room, Woodruff replied, "No, I just said the warehouse and AC room." According to Hart, the Baling and Shredding Room was not functional at that time, nor was it put into productive operation prior to his discharge, although the shredding machine had been placed in the room. In conformity with Woodruff's instructions, Hart did not post a "no smoking" sign in the Baling and Shredding Room and no such sign was there displayed

5/ In this room, Respondent contemplated depositing cardboard from unpacked merchandise cartons where it was to be placed on a conveyor and transmitted to a crusher or shredder. After the cardboard was pulverized, it was to be baled, tied up, and then sent to another plant for recycling.

prior to his discharge. From that date until April 18, Hart averred that he, as well as Woodruff and the construction employees, freely smoked in that area.

On April 18, Woodruff dispatched Hart to the Baling and Shredding Room to learn from the shredding machine's supplier how to feed baling wire into the mechanism. It is Hart's testimony that the sole material in the room consisted of baling wire which was positioned on pallets. While Hart observed the wiring procedures, he and a construction employee commenced to smoke, and another construction employee ignited an oxygen-acetylene torch to cut a brace which caused sparks to spew throughout the room. At this juncture, Norman Long, the warehouse manager, appeared and stated, "Mr. Hart, you know this is a no-smoking area. There are written and verbal rules that you shouldn't be smoking in here. Put out your cigarette." Hart dutifully complied. A few minutes later, Woodruff directed Hart to the lunchroom for a talk with Long. When Long arrived, he commented that "I have a warning letter that I want you to sign." Long placed the letter on a table and Hart read its contents. In substance, the document noted that "You have been smoking in the warehouse. You are not supposed to." Long then asked, "Are you

going to sign the warning letters?" Hart declined, stating that "All this is is an act of trickery between you and Mr. Woodruff." Long replied, "If that is what you believe." Hart remonstrated that "I had permission from Mr. Woodruff to smoke in the Shredder Room," and Long retorted, "We'll see about that." Thereupon Long left the area.

A short time later, Long returned to the cafeteria and sought out Hart. Hart inquired, "How can I do my job when you will come tell me to do something one minute and Mr. Woodruff will come tell me to do something the next minute; then when I leave one job to go do the other the other foreman will come back and get all over me, holler at me and tell me I am not doing my job, not doing it right. I told him that I was having trouble pleasing both sides. I said 'You know, I would appreciate it if we could get something worked out.'" Hart then told Long that "Mr. Woodruff had smoked in there before," to which Long responded, "It is none of your business." During this conversation, Woodruff appeared on the scene and Long asked the former whether he had given Hart permission to smoke in the Shredding Room." Woodruff answered, "No, I didn't." Long turned to Hart and inquired "Are you going to sign this warning letter?" Hart reiterated, "No, I still feel it is an act of

trickery." With this, Long told Woodruff "You heard him, Woody. You heard him. He said he wasn't going to sign this warning letter, didn't he? You heard him."

The following day, April 19, Woodruff directed Hart to the lunchroom for another confrontation with Long. Hart noticed that Mickey Hubbard, another alleged discriminatee, had finished his work shift and Hart invited Hubbard to accompany him and serve as a witness to his colloquy with Long. When the employees arrived in the cafeteria, they were greeted by Long and Jack Seeley, the personnel manager. These officials directed Hubbard to leave, which drew the response from Hart that, "You mean you are denying me the right to have a witness here?" Hart, Seeley and Long proceeded to the personnel office, where Hart was informed that he was being terminated that day for insubordination, although neither Seeley nor Long indicated the manner in which Hart had been insubordinate. Hart stated, "Do you mean to tell me it is not because of my union activities that you are firing me?" Seeley replied in the negative.

Rounding out Hart's testimony, he denied that he had used any profanity in his conversation with Seeley and Long. Hart also denied that he had ever told

Woodruff that the warning notices "were not worth a damn." According to Hart, the only discussion which he had with Woodruff concerning the notices centered around an inquiry which Hart made in which he asked Woodruff "What are those [notices] for?" This question was posed to Woodruff after Respondent had received the Union's letter apprising the company that Hart had been selected as union organizer. It is Hart's uncontroverted testimony and I find that Woodruff responded, "These statements are for when we get ready to fire troublemakers around here we will issue these and they will be evidence enough in court to keep you fired." Following the conversation with Seeley and Long on April 19, Hart drew his pay and left the plant.

Woodruff was hired by Respondent in December, 1972, and became Hart's foreman from the date of the latter's hire in February. By his own admission, Woodruff learned of Hart's active role in attempting to organize Respondent's employees on April 13 when, in his speech on that day, Plant Superintendent Hightshoe identified Hart as the leading union proponent. Following the address, Hart approached Woodruff and commented, "You know how I feel." Woodruff responded, "Fine, I feel opposite." Woodruff testified that, when Respondent began to receive merchandise at the

Center in mid-March, it promulgated a rule banning smoking at the installation, and, thereafter, he smoked in neither the warehouse nor the Baling and Shredding Room. According to Woodruff, Respondent's employees, including Hart, as well as the construction contractor's employees, were notified of Respondent's proscription against smoking on March 15. However, Woodruff acknowledged that, despite Respondent's rule, the construction workers continued to smoke throughout the building subsequent to that date. When asked whether, on April 18, an oxygen-acetylene torch was in operation in the Baling and Shredding Room, Woodruff replied, "There very well could have been. I do not know." Woodruff further testified that the baling and shredding machine was not operable until April 18. However, even on that date, Woodruff admitted that the machine was being operated on a "run-in" basis, i.e., tested and adjusted for future production work.

Woodruff testimonially conceded that he was not present when Warehouse Manager Long warned Hart on April 18 to refrain from smoking in the Baling and Shredding Room, was not present during Hart's terminal interview on April 19 which was conducted by Long and Personnel Manager Seeley, and played no part in Hart's discharge. Long was not summoned as a

witness by Respondent, and Seeley, in his testimony, simply related the conclusionary reasons which he had appended to his personnel reports regarding Hart's separation. Accordingly, the sole evidentiary basis for the discharge of Hart came from the lips of Woodruff as allegedly reported to him by Long.6/ Woodruff testified that, during the discussion between Hart and Long on the day of Hart's discharge, Long told Woodruff that Hart stated that Respondent's warning notices "wasn't worth a damn" and Hart refused to sign his warning notice relating to his smoking. Following Hart's termination, Long informed Woodruff that this personnel action had been taken because "he [Hart] was smoking in the warehouse area in violation of a published rule" and because Hart "had been smart with [Long], which was insubordination."

In an opening statement given at the inception of the hearing herein, counsel

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6/ The General Counsel interposed no objection to the obvious hearsay testimony of Woodruff regarding Long's statements to him. Despite this oversight, I accept Woodruff's utterances only to the extent that he reported the contents of Long's statements, and not for their truthfulness.

for the Respondent asserted that "Hart was fired plain and simply for smoking in an area where he had posted signs a few days prior to this that said, 'No smoking.' He did, in fact, help a supervisor to post 'No smoking' signs all over the warehouse. He was then caught there smoking. At the warning of Mr. Hart, then, he displayed profanity and a belligerent attitude. So, he was fired." In the "Separation Log" maintained by Personnel Manager Seeley, Seeley noted that Hart had been discharged on April 19 for "smoking in warehouse." When called as a witness, Seeley claimed that Hart had also been terminated for "insubordination." Asked why this reason did not find its way into his Log, Seeley replied, "There was no reason to submit it on this official report. It is not needed. It's just for my information." Despite the fact that Seeley was privy to the discussion between Long and Hart on April 19 when the latter was discharged, Seeley failed to illuminate the record with a single instance of any reported act of insubordination by Hart.

I credit Hart's testimony and find that, in spite of Woodruff's denials, Hart was told that he could smoke in the Baling and Shredding Room after March 15 and was instructed by his superior not to post a "No smoking" sign in that room because the shredding machine was not

operational and consequently no fire hazard could exist. I find that, on April 18, Hart was in the Baling and Shredding Room receiving instructions regarding the operation of the baling machine, and that the only material in that area at the time consisted of baling wire located on pallets. As Hart and a construction employee were smoking, and while sparks from an oxygen-acetylene torch were flying about, Long appeared and upbraided only Hart for smoking although the flames generated by the construction employee's cigarette and the torch would have equally endangered Respondent's premises if, indeed, the Baling and Shredding Room contained flammable material.[7/] Although Respondent contends that Hart was discharged for smoking on April 18, this assertion is belied by the fact that Hart was simply issued a warning notice on this occasion. Moreover,

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7/ Woodruff admitted on the stand that he had noticed construction workers smoke in the plant after March 15. While Woodruff disclaimed that he had any authority to discharge employees of another employer, Respondent certainly had the right to and could have enforced rules to protect its property.

Respondent adduced no probative evidence to establish in what manner, if any, Hart was insubordinate.8/

In sum, I find that, within a week following his employment with Respondent, Hart contacted the Union in quest of collective representation at the Center. By letter dated April 11, which was received by Personnel Manager Seeley on April 12, the Union advised Respondent that Hart had been designated to organize its employees. This intelligence prompted Plant Superintendent Hightshoe to advert to Hart's union activities when the former addressed his employees on April 13. On that day, Hart's super-

8/ Despite Respondent's counsel's argumentative assertion that another ingredient in the mix of Hart's separation was his display of profanity in his encounter with Long, there is absolutely nothing in this record to substantiate this claim. Moreover, while there is a hint in Woodruff's testimony that Hart's refusal to sign a warning notice was instrumental in Respondent's decision to get rid of Hart, the record fails to establish that Respondent's maintained any rule or practice for discharging employees who declined to sign such notices.

visor, Woodruff, learned of this employee's union role. On April 15 or 16, Hightshoe manifested his hostility toward Hart's support of the Union by his statement that "It is too bad that a nice young man like you would have to get messed up in an organization like you are messed up with because you would have had a great future at this plant." That Hart's days of employment with Respondent were numbered after its officials learned of his union endeavors is amply demonstrated by Woodruff's comment to Hart that warning notices "are for when we get ready to fire troublemakers around here we will issue these and they will be evidence enough in court to keep you fired."

Against the foregoing, summarized, backdrop of Respondent's hostility toward the unionization of its Center, its knowledge that Hart was one of the most prominent leaders in the move to install the Union at Respondent's facility, and its patent display of displeasure levelled against Hart because of his union proclivities, as evidenced by Hightshoe's threat to Hart, I am convinced and find that Respondent's assigned reasons for terminating Hart were advanced as a pretext to cloak its illegal motivation in removing a champion of the Union's cause from its employment rolls. I therefore conclude that, by discharging Hart on April 19, Respondent

violated Section 8(a)(3) of the Statute.

John Culpepper was hired by Respondent on March 27 as a warehouseman. He was discharged on April 20. Culpepper testified that, at the inception of his employment, he was assigned to the duties of sweeping and installing and adjusting merchandise racks in the warehouse under the supervision of Warehouse Manager Long. Shortly thereafter, William (Bill) Jacque became his supervisor. On April 10, due to the absence of the regular receiving clerk, Jacque transferred Culpepper to the receiving dock where he worked under Jerry McDuffie, a leadman. Deliveries were slow during the early part of the day, with the result that Culpepper busied himself sweeping the dock. After lunch, a delivery truck arrived and, following instructions from McDuffie, Culpepper assisted the leadman in unloading the vehicle. While engaged in this chore, McDuffie commented, "John, you're going to have to slow down a little bit. You've got all the time in the world. These truckdrivers can wait. You need to slow down. I think you are just a little too fast or a little too nervous." That evening, Culpepper visited the home of Lowell P. Hart where he was introduced to Union

Representative Joe Dixon and signed a union authorization card.[9]

Culpepper encountered another lax workday on April 11. One partially filled delivery truck entered the dock area and Culpepper received the shipment following the instructions he had obtained from McDuffie the preceding day. At lunchtime, Culpepper was summoned to Jacque's office. In the presence of Jacque, McDuffie stated, "John, we feel that you are just too nervous for this job. We are not satisfied with your results. You make too many mistakes. You just get in too big a hurry." Following this meeting, Culpepper was returned to the duties of rack adjusting in the air-conditioned department. In all, Culpepper worked on the receiving dock for 2 days.

On the morning of April 12, Culpepper was called to Jacque's office.

9/ Culpepper testified without contradiction and I find that, following the meeting with Hart and Dixon, he solicited the union membership of an employee named Herb Choice, and obtained signed authorization cards from three or four other employees. So far as this record stands, Culpepper's enchantment with the Union did not stem from McDuffie's remarks.

Upon his arrival, Jacque opened the conversation by stating, "John, you know you've got to take the good with the bad. You didn't do too good on that receiving the other day, you know, and we have to give warning notices." Culpepper replied, "Yes, I understand that." Jacque then presented Culpepper with a written warning notice dated April 12 which recited:

> Were provided detailed instruction in receiving operations on April 10, 1973. On April 11, you were provided the opportunity to put your theory to practice. Mistakes were recurring and showed a lack of concentration on your part, carelessness in work habits and a negative attitude is unsatisfactory.

Culpepper testified and I find that he read the notice and protested that, "Bill, I don't think I have a negative attitude. To me a person with a negative attitude would probably get in the truck with the carrier and probably work slow, and I was working fast. I was probably in too big of a hurry. . . . I don't think this is a negative attitude, you know, and anybody that had one, why, I think I would fire them and get rid of them on the spot." Turning to the phrase "lack of concentration," Culpepper observed,

"I don't think you could call it carelessness. I was doing the best I could. Now, I made mistakes, but I didn't think that you could, you know, just really call it carelessness. I thought it was more due to nervousness." At this juncture, Jacque stated, "Well, I'll buy the negative attitude part and the lack of concentration," whereupon Jacque deleted and initialled the phrases "showed a lack of concentration on your part" and "a negative attitude" from the warning, and noted that "we might have to have the secretary to make up another one . . . because we've got so many cross-outs on this one."

Culpepper further testified that, on April 16 or 17, he was summoned to Jacque's office on three occasions. On his first visit, Jacque announced that the meeting had been scheduled to discuss Culpepper's tardiness for work. Culpepper protested that, "Sir, I wasn't late this morning. I come in with Billy Grimes and another person and I was not late. If this is any kind of a reprimand or dismissal, well, I would like to have Pat Hart present." Jacque then inquired, "Where did you get that idea?" and Culpepper replied, "From a member of the Teamsters Union." Jacque terminated the discussion with the statement, "Well, I wasn't saying that you were late. I was just asking if you were late. On the

second visit to Jacque's office, he informed Culpepper that "we have three supervisors that saw you in a part of the warehouse that you weren't supposed to be in today." Culpepper replied that he had been instructed to attend a training session with an individual named Robert Pullins to learn the operation of the forklift and, as he proceeded to the training area, he greeted a few supervisors. When he met Pullins, the latter apprised Culpepper that the session had been cancelled because Pullins was otherwise occupied, and Culpepper returned to his regular duties of adjusting racks. Upon receiving this intelligence, Jacque scanned his assignment sheet and noted that Culpepper had in fact been scheduled for forklift training that day. Jacque apologized for his accusation with the comment, "Yes, that is correct. You were supposed to be there. That is our fault. Just think nothing of it. We do make mistakes." At the third meeting that day, Jacque again broached the subject of "negative attitude" regarding Culpepper's work habits and stated that he had drafted a new warning notice covering this topic. When Culpepper observed that it did not vary in substance from the one which he had originally received on April 12, Culpepper refused to sign it and the discussion ended.

The parties stipulated and I find that, on April 17, E. L. Jennings, Jr., the Union's assistant business representative, mailed a letter to Jack Seeley, Respondent's personnel manager, which recited that:

> "This is to advise you Southland Distribution Center employee John M. Culpepper will be actively working as a Union Organizer, in an attempt to organize your plant.
>
> Mr. Culpepper's activities will remain strictly within his lawful individual rights to self organize."

It was stipulated and I find that this document was received by Defendant on April 19.

Culpepper testified that, approximately 15 minutes before the close of his shift at 5 p.m. on April 19, Leadman McDuffie approached him in the rack adjusting area to report that Jacque wished to see Culpepper. When Culpepper inquired into the reason for the meeting, McDuffie replied, "Bill [Jacque] is going to give you another chance on this receiving. Do you want to get a little overtime today?" Culpepper

responded, "Not particularly," after which McDuffie laughed and led the employee to the receiving dock. Upon their arrival, Culpepper noticed that a deliver truck had arrived containing some 600 cases of various types of candies, and several employees were gathered around approximately six pallets. McDuffie directed Culpepper to execute the purchase orders in the manner in which he had been schooled on April 10 and 11. In company with Jacque and McDuffie, Culpepper proceeded to unload the truck until 8 p.m.[10/] It is Culpepper's undenied testimony and I find that he did not request a reassignment to receiving duties on April 19.

On April 20, Culpepper returned to his duties in the rack area. Toward the end of the shift, he was called to Jacque's office. Jacque was not there at the time, and Culpepper then proceeded to the office of Norman Long, Respondent's warehouse manager. Long stated that Culpepper had proved to be too careless

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10/ Culpepper testified and I find that, although several other receiving employees were on the dock at quitting time, he was the only employee to be tapped for overtime work that evening. Leadman Jerry McDuffie placed this figure at between 12 and 15 employees.

and had made too many mistakes to justify his retention on the employment rolls. Long thereupon announced that Culpepper was discharged.

I deem it not only implausible, but, indeed, incredible, that Respondent would have assigned Culpepper to the duties of receiving merchandise on the afternoon of April 19 unless it had an ulterior motive for doing so. Both Supervisor Jacque and Leadman McDuffie testified that Culpepper began his employment stint as a rack assembler and, on April 10 and 11, McDuffie exposed him to the job of receiving merchandise. Culpepper proved woefully inadequate in the performance of this task, a fact which was documented by McDuffie and Jacque with an 11-count indictment of his work when Culpepper was transferred back to his rack job on April 12.[11/] While McDuffie insisted that Culpepper nevertheless continued to receive merchandise until the date of his discharge, in an apparent effort to show that Culpepper's continuing inadequacies in his receiving role

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11/ On the stand, Jacque intimated that Culpepper had performed nonreceiving chores at an acceptable level of performance.

triggered his termination, Jacque openly acknowledged that there "was no receiving work done between that period of time [April 11 and April 19]." Jacque contended that Culpepper's errors in accomplishing his receiving tasks were intentionally committed.12/ This contention is belied by McDuffie's testimony that he never informed Culpepper that the latter's mistakes were deliberate. Moreover, despite the fact that at least 12 other employees who had previously received merchandise on a satisfactory basis were available to handle this work on April 19, Culpepper was selected in spite of his demonstrated inability to execute these duties. McDuffie claimed that Culpepper's selection was predicted on Respondent's desire to have him work overtime. Jacque asserted that the matter of overtime did not play a role in Culpepper's assignment on the afternoon of April 19, although he could not explain why Culpepper had been selected.

As witnesses, both Jacque and McDuffie denied that they had ever spoken with Culpepper about the Union and denied

12/ When pressed on this matter, Jacque was unable to assign any reason for this assertion.

that they had any knowledge of Culpepper's union activities prior to his discharge. I do not credit their testimony. Jacque testified that, during his terminal interview with Culpepper, the latter shook hands with Jacque and commented, "There is nothing personal in this Bill." When asked whether this statement had reference to Culpepper's union sympathies, Jacque testified "At the time when he told me that I thought that, well, this possibly could be."

I find that, after satisfactorily performing the duties of assembling racks for approximately 2 weeks following his hire, Culpepper was transferred to the receiving dock where he was schooled by McDuffie in the intricacies of handling incoming freight. Culpepper proved to be incapable and was transferred back to his former job. On April 16 or 17, I find that Culpepper was summoned to Jacque's office where the latter accused Culpepper of reporting late for work. Culpepper denied the charge and, believing that he might be wrongly reprimanded or discharged, he demanded the presence of Lowell P. Hart, an employee known to Jacque as the most ardent, active proponent of the Union at Respondent's warehouse. When Jacque inquired, "Where did you get that idea?" Culpepper replied, "From a member of the Teamsters Union."

I find that, on April 19, prior to the end of Culpepper's regular work shift, Respondent received a letter from the Union advising that this employee had been selected to organize the employees at the warehouse. Armed with the knowledge that Culpepper had thrown his lot in with the Union, I find that Respondent searched for a pretext to rid itself of this dolorous thorn-in-side. Knowing that Culpepper had demonstrated that he could not cut the mustard as a receiving clerk, I find that Respondent deliberately assigned him to receiving duties which they knew he would fail and, when Culpepper fell down on the job, as Jacque and McDuffie had anticipated, it seized upon this circumstance to sever from its rolls on April 20 an employee whose interests in the Union had become manifest. By doing so, I conclude that Respondent thereby violated Section 8(a)(3) of the Statute.

Mickey Hubbard was employed by Respondent on March 27 and was assigned to work in the shipping and receiving room. He was terminated on April 20. Howard Stroud was Hubbard's supervisor, and Bill Avant was the working foreman. Hubbard testimonially admitted and I find that, prior to April 16 and while he performed shipping and receiving duties, he had been admonished by his superiors on five occasions and had

received two written warning notices relating to his "bad attitude." For example, on one occasion he uttered obscenities to a leadman named Pullins, and Stroud called Hubbard to task for doing so. According to Hubbard, he utilized a "bad attitude" as a ploy in order to obtain a transfer from the shipping and receiving room where he did not enjoy working.

On April 16, Hubbard executed a union authorization card. On the same day, Hubbard was summoned by Supervisor Stroud to the receiving room. Also present was Avant. Stroud opened the conversation by stating that he had twice counseled Hubbard about his attitude and proffered the latter a warning notice which noted that the employee had displayed "a poor attitude and being belligerent with the fellow workers...." Stroud asked Hubbard to sign the notice. Hubbard inquired whether he might be permitted to have a witness to this incident, and Stroud answered in the affirmative. Hubbard stated that he desired to have Lowell Hart present and Stroud acquiesced. Hubbard sought out Hart unsuccessfully and, when he returned to the receiving office, Stroud suggested that Avant be the witness and Hubbard agreed. Thereupon, Hubbard signed the document. After its execution, I find that Hubbard queried Avant

as to whether the former's attitude had changed in the past and Avant replied that it had. Hubbard turned to Stroud and remarked, "Right there, you know, should be sufficient enough. Why don't you give me another chance and let me stay in this department?" Stroud demurred, stating "No, I can't do that because it would hurt my work force." Stroud then indicated that he planned to transfer Hubbard to Warehouse Manager Long's bailiwick, at which point Hubbard requested that he be moved into Bill Jacque's Freeze and Chill department. Stroud thereupon telephoned Jacque and inquired whether the latter desired Hubbard as an employee under his command. After a few moments hesitation, Jacque replied, "Yes, send him over." Upon reporting for duty, Jacque and Hubbard entered into a discussion regarding Hubbard's "attitude," with Jacque relating that he "feels like a person's attitude can change." Hubbard stated that the only reason for his poor attitude while working in the shipping and receiving room was because "I just wanted out of the receiving department because I didn't feel I could handle the job. I wasn't handling it. I never made mistakes intentionally, though, or anything like that." Following further discussion, Hubbard informed Jacque that he had signed a union designation card and was a union organizer. Jacque then announced

that Hubbard would be assigned to work under Jerry Campbell and Harold McInnis.

On April 17, Hubbard commenced to work in Jacque's department. During the day, Hubbard was called to Jacque's office where he was given another warning notice for signature. Hubbard protested that this notice was identical to the one which he had signed the previous day, and complained that "I don't deserve this warning letter because this is covered under the first warning letter." Jacque insisted that Hubbard append his signature to the document and, when the latter inquired as to what would happen if he refused to do so, Jacque said that he would be compelled to place the matter before Warehouse Manager Long. Hubbard retorted, "Let's go see Ed Long," and the two men proceeded to Long's office. Long instructed Hubbard to sign the notice, warning that unless he did so he would be terminated. After complying with Long's instruction, Hubbard asked, "How do I stand with this company in the future?" Long responded, "We won't discuss that."

Events abided until April 19. During his lunch break, Hubbard entered the lunchroom in search of his thermos bottle. Lowell Hart was seated in the room and Hubbard sat down and a conversation

ensued. Hart notified Hubbard that "I [Hart] think I am fixing to get fired. They want a meeting with me. I want you to be here to be a witness." Hubbard agreed to do so. At this juncture, Long and Personnel Manager Seeley came into the lunchroom and took a seat. Hart inquired whether Long and Seeley would permit the former to have Hubbard present as a witness to their discussion and Long replied, "No. This is just between you and the company." Long and Seeley then escorted Hart to Long's office.

Shortly before the end of his shift on April 20, Hubbard was summoned by Long and Jacque. Long told Hubbard that he had been counseled twice about his attitude and that "We have two warning letters on you for having a poor attitude. Due to these circumstances we are going to have to discharge you from the company." Before receiving his final paycheck, Hubbard told Long that "Harold McInnis had told me my attitude was real good; that he said he never had any complaints. He said he didn't know why my attitude was bad in the receiving department, or anything like that, but that my attitude since had been real good in this other depart-

ment."[13]

Bill Jacque testified that he acquired the services of Hubbard on April 16 because he was short of personnel in the Freeze and Chill department. Hubbard was assigned to work under leadman Jerry Campbell. Thereafter, Campbell reported to Jacque that Hubbard was causing problems due to his attitude. After warning Hubbard regarding this conduct on two or three occasions, Jacque recommended that Hubbard be discharged.[14] According to

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13/ Hubbard testified that, on April 17, McInnis made these statements to him. McInnis was not called as a witness in this proceeding. I therefore credit and accept Hubbard's testimony in this regard.

14/ The only example of Hubbard's "poor attitude" to which Jacque adverted involved an employee named Herbert Choice. Choice testified, in response to a question as to whether he encountered any problems with Hubbard, that "we had a few run-ins. I mean, you know, it wasn't nothing really serious. We just had some disagreements." Choice added that, in reporting the matter to Jerry Campbell, he pointed out that the differences were not serious.

Jacque, Hubbard never discussed his union activities, never stated that he had joined the Union and was an organizer in the warehouse, and never mentioned the Union.

I credit Hubbard's testimony, which is largely undenied,[15] and find that, prior to April 16, he created difficulties due to his "poor attitude" in order to obtain a transfer from the shipping and receiving room to another work area. I find that, prior to that date, he had been upbraided on five occasions regarding his conduct and, on April 16, received a written warning notice. On April 16, he was moved to the Freeze and Chill department under the supervision of Bill Jacque who believed that Hubbard could change his attitude. In the course of a discussion with Jacque on that day, I find that Hubbard informed Jacque that the former had executed a union authorization card and had been designated an organizer by the Union.[16]

15/ Neither Stroud, Avant, Campbell, McInnis, nor Long were called as witnesses.

16/ As a witness, Jacque did not impress me with his candor and I do not credit his averments that he lacked total knowledge of Hubbard's union endeavors prior to his discharge on April 20.

I further find that, on April 17, McInnis complimented Hubbard on his change of attitude which had become "real good." I find that, on April 19, Hart, the Union's chief proponent, told Warehouse Manager Long and Personnel Manager Seeley that he desired the presence of Hubbard as a witness during Hart's terminal interview, thereby further identifying Hubbard with the union movement which Respondent admittedly opposed. I am convinced that, armed with the knowledge that Hubbard had joined the Union and become an organizer, Respondent singled him out for discharge, not because of any misconduct, but because it sought to punish him for embracing the Union's cause. I therefore find that, by discharging Hubbard on April 20, Respondent offended the provisions of Section 8(a)(3) of the Act.

The complaint alleges that Respondent violated Section 8(a)(1) of the Act on April 13 when Plant Superintendent Hightshoe addressed his assembled employees and warned them "that if they became or remained members of the Union or gave assistance or support to it that strikes would inevitably result and that they would lose their jobs as a consequence." I have heretofore found that, on this occasion, Hightshoe read from a written address and told the employees that "We do not believe a union will do anything

for you other than to cause you to pay union dues and possibly involve you in strikes which could result in the loss of your job." Contrary to the General Counsel's assertion, I do not construe this statement as coercive because, in my opinion, it does not convey Respondent's unalterable belief that unionization would inevitably cause strikes and thereby cause the employees' loss of employment.[17] I shall therefore dismiss this allegation from the complaint.

The complaint also alleges that Hightshoe violated Section 8(a)(1) by warning employees that they would suffer discharge at Respondent's hands in the event they embraced the Union in its organizational efforts. I have heretofore found, based upon Hart's uncontradicted testimony, that, on or about April 15 or 16, Hightshoe informed Hart that "It is too bad that a nice young man like you would have to get messed up in an organization like you are messed up with [the Union] because you would have had a great future at this plant." Under all the circumstances herein, including the facts that Hightshoe learned on April 12 that Hart was a leader in the Union's campaign and Hightshoe's reference to Hart's activities in his

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17/ See AAA Lapco, Inc., 197 NLRB No. 50, JD at pp. 13-15.

speech of April 13, I find and conclude that Hightshoe's warning offended the provisions of Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that Respondent has engaged in and is engaging in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I have found that Respondent discharged Lowell P. Hart on April 19, 1973, and John M. Culpepper and Mickey Hubbard on April 20, 1973, because of their activities on behalf of the Union. I shall therefore recommend that Respondent make them whole for any loss of pay which they may have suffered as a result of the

discrimination practiced against them. The backpay provided for herein shall be computed in accordance with the Board's formula set forth in F. W. Woolworth Company, 90 NIRB 289, with interest thereon at the rate of 6 percent per annum computed in the manner prescribed in Isis Plumbing & Heating Co., 138 NLRB 716.

Upon the basis of the foregoing findings of fact and conclusions, and upon the entire record in this case, I hereby make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.

4. By discharging Lowell P. Hart, John M. Culpepper, and Mickey Hubbard, thereby discriminating in regard to their

hire and tenure of employment, in order to discourage membership in the Union, the Respondent has engaged in and is engaging in conduct banned by Section 8(a)(3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10(c) of the National Relations Act, as amended, I hereby issue the following recommended:[18]

ORDER

Respondent, Southland Corporation, Owentown, Texas, its officer, agents,

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18/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

successors and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with discharge for assisting or joining the Union.

(b) Discharging employees, thereby discriminating in regard to their hire or tenure of employment, in order to discourage membership in Dallas General Drivers, Warehousemen and Helpers, Local 745, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

(c) In any other manner interfering with, restraining or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act.

(a) Offer to Lowell P. Hart, John M. Culpepper and Mickey Hubbard immediate and full reinstatement to their former jobs or, if they no longer exist, to substantially equivalent employment and make them whole for any loss of pay which they may have suffered as a result of the discrimination practiced against them, in the manner set forth in the section

of this Decision entitled "The Remedy."

(b) Notify Lowell P. Hart, John M. Culpepper and Mickey Hubbard, if presently serving in the Armed Forces of the United States, of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records and reports, and all other records necessary to analyze the amount of backpay due herein.

(d) Post at its warehouse in Owentown, Texas, copies of the attached notice marked "Appendix." 19/ Copies of said notice, on forms to be provided by

19/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within 20 days from the date of receipt of this Decision, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to those allegations not specifically found herein.

Dated at Washington, D. C.

Max Rosenberg
Administrative Law Judge

the Regional Director for Region 16, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 16, in writing, within 20 days from the date of receipt of this Decision, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed as to those allegations not specifically found herein.

Dated at Washington, D. C.

Max Rosenberg
Administrative Law Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-822

THE SOUTHLAND CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSTION

The National Labor Relations Board in this case found that petitioner had violated Section 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. 158 (a)(3) and (1), by discharging three employees, including Lowell Hart, because of their union activities and by issuing an unfounded warning notice to Hart (Pet. App. 6-A, 7-A, 29-A to 31-A, 38-A to 41-A, 46-A to 48-A). The Board further found that petitioner had violated Section 8(a)(1) of the Act when its plant superintendent warned Hart, prior to his unlawful discharge, that "[i]t is too bad that a nice young man like you would have to get messed up in an organization like you are messed up with [the Union] because you would have had a great future at this plant" (Pet. App. 49-A). Accordingly, the Board ordered the Company, *inter alia,* to cease and desist from the

unfair labor practices found, to offer the discharged employees reinstatement, and to make them whole for any loss of earnings resulting from their discharges (Pet. App. 8-A to 11).

The court of appeals summarily enforced the Board's order (Pet. App. 1-A to 2-A). The principal issue raised by petitioner here (Pet. 7-11, 16-17) is whether the Board was precluded from finding that the plant superintendent's remark to Hart constituted a violation of Section 8(a)(1) of the Act because that remark was not specifically alleged in the complaint.[1] That issue does not warrant further review.

The Administrative Law Judge found that the complaint did encompass the supervisor's remark (Pet. App. 49-A).[2] Moreover, the propriety of that remark was fully

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[1]Petitioner also contends (Pet. 11-15) that the Board's finding of anti-union animus is not supported by substantial evidence. But there is ample evidence of petitioner's "hostility toward * * * unionization" (Pet. App. 30-A). See *e.g.*, Pet. App. 17-A to 19-A.

[2]Paragraph 7 of the complaint alleged (C.A. App. 39-40):

> Since on or about April 13, 1973 and continuing to date, the Respondent has interfered with, restrained and coerced, and is interfering with, restraining and coercing its employees in the exercise of rights guaranteed in Section 7 of the Act by the following acts and conduct:
>
> (a) On or about April 13, 1973, Respondent, by its supervisor and agent, M. W. Hightshoe, at its Owentown, Texas facility, orally warned its employees that they would be discharged if they became or remained members of the Union or gave any assistance or support to it.
>
> (b) On or about April 13, 1973, Respondent, by its supervisor and agent, M. W. Hightshoe, at its Owentown, Texas facility, warned its employees that if they became or remained members of the Union or gave assistance or support to it that strikes would inevitably result and that they would lose their jobs as a consequence.

Paragraph 7(b) of the complaint refers to the supervisor's speech to petitioner's assembled employees, which the Administrative Law Judge found not to violate the Act (see Pet. App. 17-A to 19-A; 48-A to 49-A). There is no reason to assume—as petitioner does (Pet. 9-10)—that Paragraph 7(a) also refers to that speech.

litigated at the hearing before him, where petitioner had a full opportunity to explain, rebut, or deny it.[3] Since the issue was tried at the hearing, the Board properly based a finding on it. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349-350.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1975.

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[3]Petitioner's contention (Pet. 10) that it had no opportunity to rebut Hart's testimony concerning the remark is not well taken, since it never requested a continuance in order to call the supervisor as a witness or otherwise to rebut the General Counsel's case.